

SERVED: February 3, 2003

NTSB Order No. EA-5006

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 13th day of November, 2002

_____	)	
APPLICATION OF	)	
	)	
ANDREW B. JONES	)	Docket 281-EAJA-SE-16214
	)	
	)	
for an award of attorney fees	)	
and expenses under the	)	
Equal Access to Justice Act	)	
_____	)	

**OPINION AND ORDER**

The Administrator has appealed from the Equal Access to Justice Act (EAJA) initial decision of Administrative Law Judge William R. Mullins, served on October 4, 2001.<sup>1</sup> The law judge granted in full applicant's request for fees and expenses totaling \$16,165.91. For the reasons expressed below, we reverse.<sup>2</sup>

<sup>1</sup> The initial decision is attached.

<sup>2</sup> We decline to grant applicant's motion to dismiss the appeal as out of time. The notice of appeal and appeal brief were timely filed, but mistakenly the notice was not originally served on applicant's counsel. Instead, one notice of appeal was served, naming applicant Jones (from this case) and the four applicants in a companion case. Applicant's counsel was served when NTSB

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The question before us is whether the Administrator was substantially justified in bringing and/or pursuing this action.<sup>3</sup> Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993) at 2 ("[to] find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory"). Reasonableness in fact and law also is to be judged as a whole, and should include an assessment, as relevant, of whether there was sufficient reliable evidence initially to prosecute the matter. Id., citations omitted.

Applicant was a pilot-examiner for Sunjet Aviation, Inc. After the crash of one of Sunjet's aircraft, investigations of the carrier's operations were initiated. Training records were reviewed. Emergency orders of revocation were issued against applicant and various pilots. As to applicant, the Administrator contended that he had intentionally falsified check ride forms, indicating that maneuvers had been performed when they had not, and that requirements had been met when they had not. The

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staff brought the error to the Administrator's attention. Therefore, we deny his motion to strike and will consider the Administrator's appeal on its merits.

<sup>3</sup> In a related proceeding involving four pilots to whom applicant had ostensibly given check rides, the Administrator claimed that training had not been provided as indicated in written training certificates and that the pilots had intentionally falsified the certificates. An appeal from a decision of the law judge granting the EAJA application in that matter is pending. In this case, applicant Jones was charged with falsifying training

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Administrator alleged different bases for these conclusions, including: first, that it was not permissible to use pilot-in-command (PIC) check rides to qualify pilots as second-in-command (SIC) (that is, qualifying pilots as SICs without giving them required specialized SIC instruction), as applicant had done; second, that various engine times shown on the check ride aircrafts' Hobbs meters were consistently and significantly less than the check ride times shown on the official check ride forms that applicant completed, and showed considerably less time than the amount of time it should have taken to perform the check rides; and third, that the Hobbs meter records did not show the number of landings (engine shutdowns and restarts) necessary to perform the maneuvers required to pass the various check rides.

The law judge dismissed the complaint. He credited testimony of various of the pilots that they had performed all the required maneuvers; he credited testimony from applicant, who believed that he could use a PIC check ride to count also as a SIC check ride; and he discounted testimony of the Administrator's key witness regarding the time necessary to perform check rides, on learning that he had little or no experience doing so in the involved aircraft. The law judge again relied on these findings in granting the EAJA application. We find, instead, that the Administrator had, and continued to have, substantial justification to proceed with the revocation

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records by way of failing to give all the required training.

proceeding against applicant.

A charge of intentional falsification requires a finding that a respondent is aware of the falsity of the statement. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (elements of fraud are: 1) a false representation; 2) in reference to a material fact; and 3) made with knowledge of its falsity). In this case, applicant contended that he did not know that it was improper to use the same maneuvers performed while conducting a PIC check ride also to count towards completing and passing a SIC check ride. The Administrator's chief witness believed applicant when he said he did not know that his method was not permissible. He testified that applicant "mistakenly assumed" that a PIC check ride could also be counted as a SIC check ride. See, e.g., Tr. Vol. I at 42. Given this testimony, the law judge apparently concluded in his EAJA decision that the Administrator had no evidence to support one of the required proofs for an intentional falsification charge, the knowledge of the falsity. Thus, he found, this theory of her case was not supported in the facts or the law and not substantially justified.

The difficulty with these conclusions is that this was only one of the issues the Administrator raised to prove intentional falsification; it was not the only one. Dismissal of this allegation does not show the Administrator not substantially justified in bringing the case. There was significant other information on which the Administrator could and did reasonably rely to support her belief that applicant had not given required

training and had falsified training forms and, in his EAJA decision, the law judge did not give appropriate weight to that evidence.

Hobbs meter records demonstrate the time an engine has been running and are used to monitor and schedule necessary maintenance. They are critical to aircraft safety. The Administrator adduced Hobbs meter readings that conflicted with flight times shown on the training forms and conflicted to such an extent that, according to the Administrator, it would have been impossible to perform a complete check ride in the time shown on the Hobbs meter. We disagree with the law judge's conclusion that the Administrator was unreasonable in relying on the Hobbs meter data in her prosecution of applicant.

For example, the Administrator's investigation produced Sunjet paperwork showing that the Hobbs meter reading of Learjet N56EM increased by .9 hour on March 10, 1999. That is, the engine of that aircraft ran that length of time that day. Exhibit A-8. The Administrator also had two check ride forms indicating that two pilots had been given check rides that day, one for 1.1 hours and the other for 1 hour. Assuming the records are correct, the inconsistencies are obvious.

The law judge decided that the Administrator was not substantially justified in relying on these data, but we do not agree. We see no basis in the investigation or in the record to conclude the Administrator should have known that the Hobbs data did not form a reasonable, reliable basis to pursue this case.

While the Hobbs data may have been in a Sunjet-produced form, it is data every carrier must keep to manage its aircraft maintenance. We have testimony from at least one pilot that he routinely entered this information in the aircraft log (Tr. Vol. II at 135), and such testimony is consistent with the importance of these data. As to the testimony to which the law judge referred in the companion proceeding involving the allegedly falsified training records of four pilots, Mr. Turner, Sun Jet's Director of Operations, testified that it was his responsibility to create training records and that he had erred in entering dates on training certificates and also on various time and duty rosters. He did not either state or infer in his testimony in that case that there were equivalent lapses in the accuracy of the Hobbs meter data. And, more importantly, in this case Mr. Turner testified specifically that he was confident that the Hobbs meter data in the format relied on by the Administrator here (a log format created by Sunjet) was accurate. Tr. Vol. III at 50-52.

Thus, in her investigation, the Administrator had developed considerable documentary evidence showing serious inconsistencies between check ride forms completed by applicant and Hobbs meter readings from the check ride aircraft. She also had the expert opinion of her staff that the various check rides could not have been properly and thoroughly completed in the Hobbs meter elapsed time.

Counsel for the Administrator had no reason to foresee that

the law judge would reject the testimony on the ground that the witness had no experience with dual check rides (indeed, dual check rides would take at least as much time as an individual one)<sup>4</sup> or check rides in jet aircraft, the check ride being substantially similar. The law judge also perceived a problem with the witness' impartiality, but he was the airline's Assistant Principal Operations Inspector (POI) and a logical candidate to represent the Administrator, the POI having testified in the related proceeding against the pilots.

To further support the view that required maneuvers had not been performed, the Administrator also had documentary evidence indicating the number of landings (engine shut-offs and restarts) that were performed during each check ride. These numbers did not coincide with the number required for a complete check ride.

The law judge rejected all this evidence on a credibility conclusion in favor of the pilot witnesses, who testified they received all required checks. The law judge made credibility determinations when he chose applicant's version of events over that of the Administrator's FAA inspector witness and his documentation. Nevertheless, the Administrator's evidence was certainly a reasonable basis to proceed with an intentional falsification claim. Substantial justification may be demonstrated even where charges have been withdrawn or an action has been dismissed, as EAJA's substantial justification test is

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<sup>4</sup> See the example, infra.

less demanding than a party's burden of proof. U.S. Jet, supra, at 3, citations omitted.

When key factual issues hinge on witness credibility, the Administrator is substantially justified -- absent some additional dispositive evidence -- in proceeding to hearing where credibility judgments can be made. Application of Peterson, NTSB Order No. EA-4490 (1996) at 6, citations omitted. Accord Application of Martin, NTSB Order No. EA-4280 (1994) at 8, and Application of Lepping, NTSB Order No. EA-4966 (2002). We do not find that there was such dispositive evidence in this case to contradict the Administrator's position. Based on all of the evidence of record, we find that the Administrator's position was substantially justified, and that the EAJA request must be denied.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Applicant's motion to dismiss the Administrator's appeal is denied;
2. The Administrator's appeal is granted; and
3. Applicant's EAJA request is denied.

CARMODY, Acting Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.